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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926
NO. 307.

C. A. HUDSON and R. R. BROGAN, Petitioners,

v.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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Statement of the Case.

The Petitioners, on the 3rd day of February, 1925, waived arraignment and pleaded *nolo contendere* (R. 19) in open court before His Honor, Robert M. Gibson, Judge of the United States District Court for the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, to an indictment (R. 3) containing six counts, the first five counts charging the defendants with having violated Section 215 of the Criminal Code, *i. e.*, using the mails to defraud, and the sixth count, charging the defendants with violating Section 37 of the Criminal Code, *i. e.*, conspiring to commit the offenses charged in the first five counts of the indictment. On February 14, 1925 (R. 19), the Petitioners were each sentenced to be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for and during the period of one year and one day.

The case was duly appealed to the Circuit Court of Appeals for the Third Circuit from the District Court of the United States for the Western District of Pennsylvania, and came on to be heard by the Circuit Court of Appeals at No. 3335 on the 15th day of October, 1925, and on the 3rd day of December, 1925, the opinion of the Circuit Court of Appeals (R. 23) was delivered and filed, affirming the judgment of the District Court.

Question Involved.

Is a Federal Court, after accepting a plea of *nolo contendere,* authorized to impose a sentence of imprisonment?

Argument.

The District Court below erred in imposing on the defendants a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after accepting a plea of *nolo contendere,* and the Circuit Court of Appeals for the Third Circuit should have reversed the judgment below for the reasons assigned in the said record in this case. The opinion of the Circuit Court of Appeals (R. 23) is reported in 9 Fed. R., 2 Ed., page 825.

In the case of *Tucker v. United States,* 196 Fed., 260, decided by the Circuit Court of Appeals, Seventh Circuit, January 2, 1912, the effect of a plea of *nolo contendere* was involved and decided contrary to the decision of the Circuit Court of Appeals, Third Circuit, in the present case.

The conclusion of the opinion of the Circuit Court of Appeals in the case at bar (R. 23) reads (*Hudson et al. v. U. S.,* 9 Fed., 2d Ed., p. 825):

> (a) "The plea of *nolo contendere* is not applicable, and, if tendered, cannot be accepted in a case where, under a statute, the punishment *must* be by imprisonment, with or without a fine; (b) but it is applicable, and, if tendered, may be accepted in a case where the punishment *may* be by fine alone, although the offense may as well be punishable by imprisonment; and (c) when so tendered and accepted the sentence may, in the court's discretion, prescribe both fine and imprisonment, or imprisonment or fine alone—in any event without limitation (except that of the statute) upon the size of the penalty."

The effect of this is that a Federal Court may not impose a prison sentence upon a plea of *nolo contendere* if the statute demands imprisonment, but may do so if the statute permits imprisonment. It is respectfully submitted that this is wholly irreconcilable with the opinion in *Tucker v. United States*, 196 Fed., 260 U. S. Circuit Court of Appeals, Seventh Circuit, which declares:

> "The rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed upon conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term with or without fine."

The necessary effect of this is that the Court may not impose sentence of imprisonment upon the plea of *nolo contendere.*

The penalty provided in Section 215 of the Criminal Code, covered by the first five counts in the indictment (R3), is a fine of not more than $1,000.00 or imprisonment of not more than five years, or both, and the penalty provided in Section 37 of the Criminal Code, covered by the sixth count in the indictment, is a fine of not more than $10,000.00 or imprisonment of not more than two years or both. It will be observed that neither of these sections demand the penalty of imprisonment as each section provides that the penalty may be either fine or imprisonment or both. It is the position of the Petitioners that a Federal Court is without power to accept a plea of *nolo contendere* if the statute involved requires imprisonment, but that the plea may be accepted where the statute involved provides for a penalty of fine or imprisonment, and that in such cases, when a plea of *nolo contendere* is accepted, a Federal Court is without power to impose any penalty of imprisonment or, in other words, is limited to imposing nothing more than a fine.

It does not appear in the record in this case, but a perusal of the indictment in the *Tucker case* shows that the indictment charged violations of Sections 3296, 3326, 3324, 3455 and 3317 of the Revised Statutes. The punishment for violating Section 3455 R. S. is "a fine of not less than $1,000.00 nor more than $5,000.00, or to imprisonment for not less than six months or more than five years, or to both, at the discretion of the Court." Concerning this, the Court in the *Tucker case* said:

> "So it was within the authority of the prosecuting officer to elect to stand, for the purpose of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission. Were the subsequent proceedings consistent with acceptance of the plea in that view, we are satisfied that no reversible error would appear in allowance thereof. * * * Moreover, the judgment is alike inconsistent with acceptance of the plea as above defined, in pronouncing imprisonment in the penitentiary for eighteen months."

The *Tucker case*, therefore, clearly decides that the plea was properly accepted in that case as applying to certain counts which contained charges punishable by fine or imprisonment or both, but that imprisonment in the penitentiary for eighteen months was "inconsistent with acceptance of the plea."

We beg to quote further from the *Tucker case*, 196 Fed., 260, as follows:

> "(2) The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine,' necessarily implies, as we believe, that the case for such allowance must be

within the class of misdemeanors for which punishment may be imposed by *fine alone,* although the offense may as well be punished by imprisonment, at the discretion of the court, either as an alternative of fine, or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum—we have no doubt. This provision, however, for such purpose in the submission—as the object sought by the defendant in electing to submit without contest—requires construction of the rule accordingly, as limited to cases consistent with the purpose thus declared. So defined, the rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term, with or without a fine. Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized—however desirable it may seem—without statutory provision therefor. In arriving at such conclusion, we have not overlooked the settled doctrine that such short terms of imprisonment were not "infamous punishments" as defined in England and America for more than a century (see *Mackin v. United States,* 117 U. S., 348, 351, 6 Sup. Ct., 777, 29 L. Ed., 909, and *Fitzpatrick v. United States, ante*), nor the

fact that imprisonment, at the time the rule was adopted, was frequently made the alternative of fines, or imposed together with a fine for 'crimes of inferior nature' (*2 Cooley's Black,* book 4, p. 5), 'in which the public punishment is not severe, but affords room for private compensation'—imposed also for commercial indebtedness—and was regarded with far less opprobrium than attaches to every form of imprisonment at the present day. Neither of these considerations appears to have entered into the framing of the rule, and we are not at liberty to adopt a different rule for application to the case at bar.

(3) The contention, however, that the trial court was without jurisdiction to allow the plea under the indictment in the present case, we believe to be untenable, notwithstanding the foregoing interpretation of the rule. It is undoubted that the counts of the indictment, charging an offense for which at least three months' imprisonment must be imposed with a fine, are not within such interpretation, but other counts (as above mentioned) charged offenses which *may be punished by fine alone, and thus furnish ground for entertaining the nolo contendere plea,* as 'in the nature of a compromise' between the prosecutor and the defendant."

* * * * * * * *

"That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the *nolo contendere plea* as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining *the amount of fine to be imposed,* but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. *Com. v. Horton,* 9 Pick. (Mass.), 206; *Com. v. Ingersoll,* 145 Mass., 381, 382,

14 N. E., 449. The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea (*Com. v. Ingersoll, supra*), thus leaving it unsupported for want of either of the authorized pleas to the indictment.

The judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law." (Italics ours.)

On the same day, the same Court, basing its decisions on the reasons set forth in the *Tucker case*, reversed the District Court in the case of *Shapiro v. United States*, 196 Fed., 268, and in the case of *Blum v. United States*, 196 Fed., 269.

In the *Shapiro case* it appears that the indictment in some counts charged offenses which demanded a penalty of imprisonment without the alternative of a fine, and that other counts demanded penalties of either imprisonment or a fine, or both. It also appears from the record that the district attorney entered *nolle prosequi* as to those counts, the penalty for which was either a fine or imprisonment, or both, and that the plea of *nolo contendere* was accepted by the District Court as to those counts which required imprisonment, and that thereupon the Court sentenced Shapiro to imprisonment for two years and pay a fine in the sum of $10,000 in addition to the costs. The Circuit

Court of Appeals reversed the judgment of the District Court and remanded the cause, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law. It seems that thereupon the District Court refused to accept the plea of *nolo contendere* (probably for the reason that only prison counts remained), and directed the defendant to plead to the indictment. The defendant stood mute and the Court entered for him a plea of not guilty. Subsequently, by leave of Court, the plaintiff filed three special pleas, to which the Government demurred, and the the District Court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, and the defendant was sentenced to imprisonment for two years and to pay a fine of $5,000. The case was then brought directly to the Supreme Court of the United States and is reported in 235 U. S., 412. The Supreme Court granted the motion to dismiss because of lack of jurisdiction, but we submit that the opinion of the Supreme Court is an affirmation of the decision in the *Tucker case*, 196 Fed., 260, and we quote from the decision of the Supreme Court in the *Shapiro case* (235 U. S., 412, at p. 413) as follows:

> "* * * Shapiro sued out a writ of error from the Circuit Court of Appeals, assigning as errors (1) that the District Court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere;* (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within the meaning of the Fifth Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The Circuit Court of Appeals reversed the judgment, 196 Fed. Rep., 268. The grounds of the reversal are set forth in its opinion in *Tucker v. United States*, 196 Fed. Rep., 260—a case, decided at the same time,

which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; *that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as 'in the nature of a compromise';* and that in such case it is 'within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto,' and it is 'within the jurisdiction of the court to approve such submission.' It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either 'accepted in fact' or 'substantially so treated'; that the proceedings leading to the judgment, the adjudication of guilt, and the *judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea;* and hence that the record failed to show an authorized plea to support the judgment. *Id.,* pp. 267, 268. The cause was remanded 'with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law.'" *Idem,* at p. 415.

"* * * The motion to dismiss must be granted. *Aspen Mining Co. v. Billings,* 150 U. S., 31; *Brown v. Alton Water Co.,* 222 U. S., 325; *Metropolitan Water Co. v. Kaw Valley District,* 223 U. S., 519; *Union Trust Co. v. Westhus,* 228 U. S., 519. The duty of the District Court was defined by the decision of the Circuit Court of Appeals and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case

of Shapiro, the Government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the District Court was not free to accept the plea of *nolo contendere* as applicable to the remaining 'prison counts.' Its obedience to the mandate under the law as declared by the Circuit Court of Appeals required it with respect to these counts upon which the Government stood to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the District Court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the Circuit Court of Appeals and we are in substance asked to revise its decision upon a writ of error to the District Court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited." (Italics ours.)

We submit the following from *Ruling Case Law* and *Corpus Juris.*:

"The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine' necessarily implies that the case for such allowances must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offenses may as well be punished by imprisonment at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of

the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum—there is no doubt. So defined, the rule affords no ground for entertaining the plea either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor, for which the punishment must be imprisoned for any term, with or without a fine."

Ruling Case Law, 8 R. C. L., page 117.

"Under the common-law rule which governs in the federal courts, to authorize the court to entertain a plea of *nolo contendere*, the case must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may be punishable as well by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine; and such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any time, with or without fine."

16 Corpus Juris, Criminal Law, page 405.

Instruction to United States Marshals, Attorneys, Clerks and Commissioners, July 1, 1925, page 178, reads:

"*Pleas of Nolo Contendere*, 1060. In any case where the statute upon which the indictment is based requires imprisonment as the sole or partial punishment, consent should be refused to the plea of *nolo*

contendere and objection made to its acceptance, as such acceptance would prevent punishment by imprisonment. It should be accepted only in cases punishable solely by fine. (See 196 Fed., 260, and 235 U. S., 412)"

Section 222, Vol. 1, *Zolines Federal Criminal Law and Procedure,* reads as follows:

"The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution. Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors. Hence imprisonment cannot be imposed upon a plea of *nolo contendere.*"

The plea of *nolo contendere* is in the nature of a compromise between the Government and the defendant. It is not a conviction, and is not an acknowledgment of guilt. The Petitioners in the present case, without being convicted, without a trial, and without an acknowledgment of guilt, were each sentenced one year and one day to the Federal Penitentiary at Atlanta, Georgia.

It is respectfully submitted that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the common law and is in conflict with the decision in the *Tucker case* as interpreted by *Ruling Case Law, Corpus Juris, Zoline's Criminal Law,* and the Attorney General of the United States.

Respectfully submitted,

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